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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. ... 816

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDWIN W. SMITH,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 831.

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May it please the Court:

The petition of A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, respectfully shows to this Honorable Court:

This case is between the same parties, involves exactly the same facts and presents precisely the same question as the case at No. 831 October Term, 1934, of this Court, in which Petitioners have also filed a petition for certiorari.

In the District Court, at No. 1434 in Equity, wherein Piedmont Coal Company et al. are Plaintiffs and Tower Hill Connellsville Coke Company of West Virginia (hereinafter called "Tower Hill") is Defendant, a decree had been entered winding up the business and affairs of Tower Hill and directing the distribution of its assets among its creditors and stockholders and appointing Receivers (Petitioners) for that purpose. That decree was affirmed (64 Fed. (2nd) 817; certiorari denied, 290 U. S. 678, 78 L. Ed. 86). That cause was referred to in the District Court and the Circuit Court of Appeals as the "Primary Cause."

A Special Master having been appointed in the Primary Cause to ascertain Tower Hill's creditors and stockholders and their respective rights and priorities, (R., p. 44) Respondents appeared before the Special Master, filed formal proofs of claim and introduced evidence in support thereof (R., pp. 47-63; 41).

Petitioners, as Receivers, tendered in the Primary Cause an Ancillary Bill setting up equitable counterclaims against Respondents, and by a decree in the Primary Cause the District Court ordered the Ancillary Bill to be filed and directed that for convenience it be given a separate number but that it and all proceedings pursuant thereto should be ancillary to the Primary Cause (R., p. 64). Accordingly, the Ancillary Bill was assigned No. 3370 in Equity (R., p. 2) and has been known in that Court and in the Circuit Court of Appeals as the "Ancillary Cause."

Motions to dismiss the Ancillary Bill having been filed by Respondents in the Primary Cause (R., p. 66) as well as in the Ancillary Cause (R., p. 24), the District Court sustained the motions and entered substantially the same decree at each number (R., pp. 68, 26). From each of these decrees Petitioners appealed, the appeal

in the Primary Cause being No. 3736 in the Circuit Court of Appeals and the appeal in the Ancillary Cause No. 3737. The appeals were argued together and were disposed of in one opinion (R., p. 74) and by one decree (R., p. 86).

The petition at No. 831. October Term, 1934, is for a certiorari to review the decree in the Primary Cause (No. 3736) and this petition is for a certiorari to review the same decree in the Ancillary Cause (No. 3737).

As the facts involved, the question presented and the reasons for the allowance of the writ are exactly the same as those set forth in the petition at No. 831. October Term, 1934, (the Primary Cause), Petitioners deem that the Court will not be assisted but, on the contrary, burdened by a repetition here of what is said in that petition and the supporting brief, and they respectfully request that what is there said may be considered and taken as part hereof.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case, numbered and entitled on its Docket No. 3737, A. S. Alexander, H. D. Rummel and George S. Baton, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a corporation, Appellants, v. J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal and Coke Company, a corporation, and Hecla Coal and Coke Company, a corporation, Appellees, and that said decree of the Circuit Court of Appeals for the Fourth Circuit may be reversed, and

that your Petitioners may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your Petitioners will ever pray.

EDWIN W. SMITH,

ARTHUR S. DAYTON,

E. C. HIGBEE,

WM. M. ROBINSON.

Counsel for Petitioners.

Dated: April ...., 1935.
Pittsburgh, Pa.

PETITIONER'S BRIEF

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SEP 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

NOS. 15 AND 16.

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,

Petitioners,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation,

Respondents.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

NOS. 15 AND 16.

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation,

Petitioners,

vs.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation,

Respondents.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR PETITIONERS.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 75 Fed. (2d) 451. The separate opinion of Judge Soper of that Court is reported in 75 Fed. (2d) 456. These opinions will be found on pages 66 and 74, respectively, of the Record.

The opinion of the District Court, styled "Memorandum Decision," is not reported but will be found at page 23 of the Record.

II.

JURISDICTION.

(1) Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended; United States Code Annotated, Title 28, Section 347.

(2) The decree of the Circuit Court of Appeals was entered January 23, 1935 (R. 77). The motion for rehearing was presented February 19, 1935 (R. 78), and was denied without opinion March 2, 1935 (R. 85). A petition for certiorari was filed April 1, 1935 (R. 86) and the order allowing it was entered May 6, 1935 (R. 86).

III.

QUESTIONS PRESENTED.

The questions presented are:

(1) When a claimant appears before a master in a federal receivership proceeding and proves a claim to share in the distribution of the receivership *res,* does he submit himself to the jurisdiction of the receivership court for the adjudication of his liability to the *res,* when the counterclaim asserted against him by the receiver is of a nature cognizable in equity and its adjudication is essential to a final disposition of the receivership proceeding?

(2) Is not the adjudication of the counterclaim against the claimant and the determination of the whole controversy within the purpose and intendment of Equity Rule 30?

IV.

STATEMENT OF THE CASE.

There were two appeals in the Circuit Court of Appeals, No. 3736 known as the "Primary Cause", and No. 3737 as the "Ancillary Cause". The Primary Cause is in this Court on certiorari at No. 15 October Term, 1935, and the Ancillary Cause at No. 16 of that Term. Precisely the same question is involved in each appeal and the parties to each are the same. In the Circuit Court of Appeals the Record was printed separately for each appeal, and that course has been adopted here. The printed Record at No. 15 contains the same matter appearing in the Record at No. 16, although differently arranged. This brief covers the appeal at each of the numbers and the references herein to the Record are to the printed Record at No. 15. The relation of the Primary Cause and the Ancillary Cause to each other and the reason for the two appeals will appear as the Statement of the Case develops.

The Primary Cause, wherein Piedmont Coal Company and others are Plaintiffs and Tower Hill Connellsville Coke Company of West Virginia (hereinafter called "Tower Hill") is Defendant, is a suit in equity in the District Court of the United States for the Southern District of West Virginia, wherein the District Court entered its decree directing that the business and affairs of Tower Hill be wound up, its assets distributed among its creditors and stockholders according to their respective rights, and appointing Receivers (Petitioners) for that purpose. That decree was affirmed by the Circuit Court of Appeals for the Fourth Circuit (64 Fed. (2d) 817) and certiorari was denied (290 U. S. 678, 78 L. Ed. 86).

After the denial of the certiorari and the coming down of the mandate, the District Court, on December 12, 1933, referred the cause to a Special Master (R. 1) "to take, state and report an account and report to the Court" all the debts, obligations and claims against Tower Hill and the nature, amount and respective priorities thereof, the owners of the preferred stock and common stock of Tower Hill, and "such other matters as any party in interest may require, the same being pertinent, or such other matters as said Master himself may deem pertinent, whether so required or not."

At a hearing before the Master held January 30, 1934, after due notice, the Respondents, who are hereinafter referred to as "Hillman", "Sheets", "Watson", "Hillman Company" and "Hecla", respectively, severally appeared and made proof of their claims. Each of them is a non-resident of the Southern District of West Virginia.

Hecla's claim is as a holder of preferred and common stock of Tower Hill (R. 4, 36); Hillman's is for salary as President of Tower Hill (R. 37); Watson's is for attorney's fees and salary as Secretary of Tower Hill (R. 6, 37), and Hillman Company's is for a balance of operating expenses and rentals under a pool arrangement affecting Tower Hill (R. 10, 37). Hillman and Sheets claim as sureties on a supersedeas bond upon a former appeal (R. 13, 37).

Thereafter Petitioners, on February 19, 1934, tendered for filing an Ancillary Bill (R. 39) averring that Respondents had severally appeared and that they were each liable to Tower Hill in large sums of money by reason of certain facts therein set out in detail, and praying that they be required to account for and pay what upon such accounting appeared to be justly due and owing to Tower Hill. Each of the matters com-

plained of in the Ancillary Bill is cognizable in a court in equity. They all relate to the fraudulent mismanagement of the business and affairs of Tower Hill by Hillman, Sheets and Watson, who were its officers and directors, and in some of which the other Respondents participated or from which they benefited.

On presentation of the Ancillary Bill, the Court entered a decree in the Primary Cause (R. 19) ordering it to be filed and directing that "for convenience the Clerk be, and hereby he is directed to give it a separate number but that it and all proceedings pursuant thereto shall be ancillary to this cause". The order prescribed what notice should be given to each Respondent and when he or it should plead. Conformably to that order the Ancillary Bill was filed the same day and was assigned a separate number, 3370 (R. 39), and the prescribed notice was given (R. 56, 57).

March 19, 1934, Respondents filed two separate motions challenging the jurisdiction of the District Court respecting the Ancillary Bill. The one filed in the Primary Cause (R. 20) is entitled "Motion to Vacate Order of Court Entered February 19, 1934, and to Quash Service of Said Order and of the Bill of Complaint Therein Mentioned", whereby Respondents moved "to quash the service of the said order and of the Ancillary Bill of Complaint therein mentioned and filed at No. 3370 in Equity of this Court." Respondents' other motion, filed in the Ancillary Cause (R. 58), is entitled "Motion to Quash Service and to Dismiss Bill for Want of Jurisdiction", whereby they moved "to quash the service of a copy of the order entered by this court in the case of Piedmont Coal Company and others against Tower Hill Connellsville Coke Company of West Virginia, No. 1434 in Equity, and a copy of the Bill of Complaint filed at the above Number in Equity and therein

designated as 'Ancillary Bill of Complaint' and to dismiss said Bill for want of jurisdiction."

Thereafter, in June 1934, the District Court handed down a Memorandum Decision (R. 23) and July 30, 1934, entered its decree in the Primary Cause (R. 22) making the Memorandum Decision a part of the Record, sustaining Respondents' motion and dismissing the Ancillary Bill for want of jurisdiction over the persons of Respondents. On the same day the Court entered a substantially similar decree in the Ancillary Cause (R. 60).

From each of these decrees Petitioners appealed, the one being No. 3736 in the Circuit Court of Appeals and the other No. 3737. The former was from the decree in the Primary Cause (No. 1434 in the District Court) and the latter was from the decree in the Ancillary Cause (No. 3370 in the District Court). The two appeals were argued in the Circuit Court of Appeals as one and were so considered by that Court.

January 22, 1935, the Circuit Court of Appeals, in an opinion by Judge Northcott (75 Fed. (2d) 451; R. 66), entered the same decree in each of the appeals, modifying the decrees of the District Court by directing that the Ancillary Bill be retained for certain purposes and that the pleadings be amended in certain respects, and otherwise affirming the District Court. The decree of the Circuit Court of Appeals in the Primary Cause will be found at page 77 of the Record at No. 15 October Term, 1935, and its decree in the Ancillary Cause will be found at page 74 of the Record at No. 16 October Term, 1935. Judge Soper, of the Circuit Court of Appeals, filed a separate opinion dissenting from the decision of the majority (75 Fed. (2d) 456; R. 74).

In view of the fact that Respondents made two motions, one in the Primary Cause and one in the Ancil-

lary Cause, and the District Court sustained them by separate decrees, Petitioners (Receivers) deemed it expedient to take two appeals, although the question raised by each was exactly the same and was presented by precisely the same Record.

The sole question is, as stated by the District Court, "has this court, under the circumstances herein set out, jurisdiction of the defendants (Respondents)" (R. 24). Regarding the circumstances to which the Court refers, the District Judge, in his Memorandum Decision, said (R. 23):

> "The claim of the plaintiffs is that by reason of the appearance of these defendants in this suit before the Master to whom this suit had been rendered (referred), and by reason of the claims of these defendants filed before the Master, claiming certain sums of money in each case to be due each one thereof, each one of them became a party to this suit for all purposes, and that by reason thereof, the receivers had a right to file this ancillary bill in this suit to recover the sums of money claimed.
>
> "For the purpose of information, this court entered an order on the 19th day of February, 1934, requiring the defendants to appear by a certain date and make any motions they might desire, and directing that a true copy of the order and of the bill be delivered to the defendants.
>
> "This order, and the things to be done thereunder, were then or now in no way intended to be a service of process upon these defendants. The whole theory of the plaintiffs was and is that these defendants were already parties to this suit, and did not require any service of process upon them, other than to give them notice of the filing of the bill.

"By motions filed on the 19th day of March, 1934, the defendants first moved to quash what they called 'service' upon the defendants, and to dismiss the bill for want of jurisdiction; also moved to vacate the order of court entered on the 19th day of February, 1934, and to quash the service of said order and of the bill of complaint mentioned therein.

"As stated above, there was no pretense that such order was a service of process."

In sustaining Respondents' motions and dismissing the Ancillary Bill, the District Court said (R. 24):

"* * * Under the decisions of the Supreme Court of West Virginia, I am inclined to hold that they (Respondents) are parties for all purposes. However, I find but little, if any, supporting authority from federal courts for that holding.

"I appreciate the fact that if I were to so hold, then the suit would have to proceed to a final conclusion before the question of jurisdiction could be finally decided. Great cost and expense would be incurred. It is to be regretted that a Federal District Judge has no way of certifying a question of this character to the Circuit Court of Appeals.

"I think it right, in this case, however, to enter an order sustaining the motion of the defendants, so that the plaintiffs can appeal therefrom and we can be favored with a final decision on the question whether this court has or has not jurisdiction, as claimed by the plaintiffs, and which is denied by the defendants."

The Circuit Court of Appeals modified and affirmed the decree of the District Court, and directed the Record to be remanded (75 Fed. (2d) 451, 456; R. 73)—

"* * * to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counterclaims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the adjudication of any counterclaim or counterclaims in a court of competent jurisdiction."

V.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred—

(1) In not holding that Respondents, by appearing in the receivership cause and proving their claims for participation in the receivership *res*, submitted themselves to the jurisdiction of the District Court in that cause for adjudication of equitable counterclaims.

(2) In not reversing the decrees of the District Court dismissing the Ancillary Bill and in not remanding the Record with directions to reinstate the Ancillary Bill.

(3) In not holding that the District Court had jurisdiction of the persons of Respondents.

(4) In not holding that the District Court had jurisdiction to entertain the Ancillary Bill and proceed to a final adjudication of the entire controversy.

VI.

SUMMARY OF ARGUMENT.

(1) Jurisdiction of the Subject Matter.

A district court administering a receivership estate has authority to adjudicate all claims respecting the *res*, not only those to or against the *res* but those on behalf of the *res* against others. The Circuit Court of Appeals so held.

(2) Jurisdiction of Persons of Respondents.

When Respondents appeared before the Special Master and asserted claims to participate in the distribution of the receivership *res*, the Court in the receivership proceeding acquired jurisdiction to grant affirmative relief against them upon equitable counterclaims asserted by the Receivers. The Circuit Court of Appeals erred in not so holding.

(a) Respondents Submitted to the Jurisdiction of the Court.

Respondents, by appearing before the Special Master and proving their claims to participate in the receivership *res*, became actors in the cause and thereby submitted to the jurisdiction of the Court.

(b) Equity Rule 30.

It is the spirit and intendment of Equity Rule 30 that when affirmative relief is sought in an equity proceeding, whether by bill or other appropriate pleading, the claimant submits himself to the jurisdiction of the Court for the adjudication of equitable counterclaims, irrespective of the transactions out of which such coun-

terclaims arose, to the end that the whole of the controversy may be determined in a single proceeding.

(c) APPLICATION OF THESE PRINCIPLES.

(3) The Claims Against Respondents.

The counterclaims against Respondents are cognizable in equity and their adjudication by a court in equity does not deprive Respondents of any right to trial by jury.

(4) The Opinion of the Circuit Court of Appeals.

It limits the consequences of the acts of Respondents too narrowly and does not give effect to the spirit and intendment of Equity Rule 30.

VII.

ARGUMENT.

(1) Jurisdiction of the Subject Matter.

A district court administering a receivership estate has authority to adjudicate all claims respecting the *res*, not only those to or against the *res* but those on behalf of the *res* against others.

While this proposition is not here in dispute, and was in effect conceded by Respondents and was affirmed by the Circuit Court of Appeals (75 Fed. (2d) 451, 453; R. 68), it may be helpful to consider the principles underlying the broad powers exercisable by a court in equity in administering and distributing the *res* in a receivership proceeding, because they throw considerable light upon the precise question here involved.

It has been conclusively decided by an unbroken line of federal authority that the appointment of receiv-

ers of a corporation brings into the jurisdiction of the appointing court the entire assets of the corporation and all claims of whatsoever character relating thereto. The jurisdiction of the court is not limited to those assets of which the receivers peaceably obtain possession, but includes assets of the corporation in the possession of others, whether they be tangible property or choses in action, and the arm of the court reaches out to reduce them to possession. In the exercise of this jurisdiction, the power of a federal court is not dependent upon the amount in controversy or the citizenship of the parties. It may proceed by petition, by ancillary bill, or in such other manner as to it may seem appropriate. The only limitation upon its power is that in some way or other it acquire jurisdiction of the persons against whom the power is sought to be exercised. The citation of a few of the leading cases establishing the doctrine and presenting the reasons on which it is founded is all that is required for the present purpose.

White v. Ewing, 159 U. S. 36; 40 L. Ed. 67.

A receiver was appointed for Cardiff Coal & Iron Company, a Tennessee corporation, by the Circuit Court for the Eastern District of that State upon a creditor's bill. The receiver filed a petition in the receivership cause setting forth that a large portion of the company's assets consisted of promissory notes amounting to about $225,000.00, executed by one hundred thirty different persons and for various amounts, many of them less than $2,000.00. Upon this petition the Court directed the receiver to institute suit by proper bill or petition in the receivership cause against all these persons, irrespective of the amount of the claim. This was done and decrees were entered against all the defendants. Appeals were taken to the Circuit Court of Appeals and

that Court certified to this Court for its determination this question (37; 67):

> "Had the circuit court of the United States in a general creditor's suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, so far as in said suit, the receiver claimed the right to recover from any one debtor a sum not exceeding $2000."

In answering this question in the affirmative and holding that the Circuit Court had jurisdiction in the ancillary proceeding irrespective of the amount in controversy or the citizenship of the parties, this Court, in an opinion by Mr. Justice Brown, said (39; 68):

> "The circuit court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditor's bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver; and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties or of the amount in controversy. (Cases cited)
>
> "Indeed, it was conceded that, where an insolvent corporation is placed in the hands of a receiver of the circuit court, such appointment draws to the jurisdiction of that court the control of its assets, so far as persons having claims to participate in the distribution of such assets are con-

cerned, and that parties must go into that court in order to assert their rights, prove their demands, and receive whatever may be due them, or their share or interest in the estate. But it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to them of claims they may hold against the estate, and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company, and has no higher rights than the corporation, and having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed.

"This position is entirely correct so far as the right of the receiver to recover upon the merits is concerned; but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits. The receiver does not take his authority as an ordinary indorsee of the paper, and subject to the disability to sue in the Federal court, which attaches to such indorsee, but he takes title by operation of law, and as an instrument of the court which appointed him. The cases upon which the appellant relies, of *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42 (36; 66), and *Walter v. Northeastern R. Co.*, 147 U. S. 370 (37; 206), were both original bills over which jurisdiction could only be acquired upon proper allegations of citizenship and amount. In this case, however, the court proceeds upon its own authority to collect the assets of an estate, with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the

estate of an insolvent corporation over which it has by an original bill obtained jurisdiction."

Peck v. Elliott, 79 Fed. 10,
Circuit Court of Appeals, Sixth Circuit.

Upon a creditor's bill, the United States Circuit Court for the Southern Division of the Eastern District of Tennessee appointed Receivers of the Southern Malleable Iron Company. The object of the bill was to preserve the property as an operating unit, collect its debts, complete certain valuable contracts and sell the property as a whole, including its good will, for the satisfaction of all its debts according to priority of lien. The receivers filed a petition alleging that the president of the corporation was indebted to it upon an unpaid stock subscription. Leave of court was granted to file the petition and to make the president a party defendant. The president filed his answer denying the jurisdiction of the court, its jurisdiction to proceed against him by petition or bill in equity, and his liability as a stockholder. Proof was taken and the petition dismissed. Upon appeal, the decree was reversed with directions to enter a decree against the president for the amount of his unpaid stock subscription. In the opinion of the Circuit Court of Appeals, delivered by Judge Lurton and concurred in by Judges Taft and Sage, upon the question of jurisdiction it is said (11):

"The jurisdiction of the court to entertain this petition of the receivers against the appellee depends upon its jurisdiction in the original case, to which this proceeding was wholly ancillary. This petition is auxiliary to the original suit. It is a petition by the receivers asking the aid of the court to enable them to collect in an asset of the corporation. It was filed by direction of the court under an order made in the principal cause. The jurisdic-

tion of the court in the principal cause is not questioned, and cannot be in this collateral suit. (Cases cited) The fact that the circuit court had possession of all the assets of the Southern Malleable Iron Company, for the purpose of winding up its affairs as an insolvent corporation, is the fact which made it admissible to bring a debtor of that corporation into the court, to the end that his debt might be ascertained and payment coerced. For the purpose of collecting in choses in action, the court might direct its receivers to institute independent suits in that or courts of the state, or cause such debtors to be made defendants in the principal cause, and determine for itself any question which might be involved by the defenses to the claim. Such a proceeding would not involve any question of citizenship, or amount in controversy, nor mode of trial. The complete jurisdiction of the court over the *res*, the property and assets of this corporation, involved its right to bring before it persons having possession of any of those assets, or having claims thereon, or who were indebted to it, and either itself hear and determine all controversies, or refer them to a master or to a jury, as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. It might, in its discretion, submit such controversy upon issues made to a jury, or dispose of them without doing so. That the liability of appellee was one of a legal character did not operate to defeat the jurisdiction, and bring its proceedings against him to a stand. These questions seem conclusively settled by *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, a case which arose upon a like proceeding in the same court, and in which

certain questions were certified by this court under the court of appeals statute."

Pope v. L. N. A. & C. Ry. Co., 173 U. S. 573; 43 L. Ed. 814, in which Mr. Chief Justice Fuller said (577; 816):

"* * * When an action or suit is commenced by a receiver, appointed by a circuit court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the circuit court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested;"

and again (578; 817):

"The suits in which this receiver was appointed were in the nature of creditors' bills alleging an indebtedness due from the Atlantic Company; the insolvency of that company; that certain corporations had in their possession assets of the Atlantic Company; and praying for the appointment of a receiver; the marshaling of assets; the winding up of the Atlantic Company, and the application of its assets to the payment of its debts. The only ground of Federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the circuit court of appeals, the decision of that court would have been final under the statute. And as this suit was in effect merely in collection of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the circuit court of appeals therein."

(2) Jurisdiction of Persons of Respondents.

(a) RESPONDENTS SUBMITTED TO THE JURISDICTION OF THE COURT.

A court obtains jurisdiction of persons in either of two ways—by the service of process or by submission. The former is not here claimed, and the argument will be confined to the latter.

Submission results from some act intended to accomplish that result, such as a praecipe for appearance, or, on the other hand, may be by some step taken in the course of a cause, which in law has that effect, although it may not have been so intended. The latter is what is here involved.

This is aptly expressed by Mr. Chief Justice Fuller in *Wabash Western Ry. Co. v. Brow,* 164 U. S. 271, 278, 41 L. Ed. 431, 434:

> "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended."

When a party submits himself to the jurisdiction of a court in a particular case, he is bound by every order and decree legitimately entered therein just as effectively as if he were brought in by process regularly issued and served.

Although in particular cases there may be other governing criteria, an inerrant test of what constitutes a general appearance conferring jurisdiction over the person is whether the person has become an actor in the cause.

This principle is clearly established by *Merchants Heat & Light Co. v. James B. Clow & Sons,* 204 U. S. 286; 51 L. Ed. 488. It was there said by Mr. Justice Holmes (290; 490):

> "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits,"

and again (290; 490):

> "* * * there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and, to the extent of his claim, a cross plaintiff in the suit."

Although different in its facts, that case is completely identic in principle with the one at bar. The suit was in the Circuit Court of the United States for the Northern District of Illinois by a citizen of that State against a citizen of Indiana. The defendant moved to set aside the service, the ruling was adverse, and it excepted. It then answered and set up a counterclaim by way of recoupment and sought to recover a balance. Judgment went against it and it appealed to this Court, assigning as error the denial of its motion to set aside the service.

This Court declined to express an opinion upon the merits of the motion "because it is not necessary for the decision of the case, in view of the submission to the jurisdiction which the facts disclose." However, assuming that defendant lost no rights by pleading to the merits, as required, after saving its rights, this Court held that "by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the Court in the same action, and, by invoking, submitted to it."

In discussing the effect of its pleading the counterclaim, Mr. Justice Holmes said (289; 489):

> "* * * But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But, even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross demand, as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant, by pleading it, is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice. (Citing cases) This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense."

Mr. Justice Holmes cited *Fisher v. Shropshire*, 147 U. S. 133; 37 L. Ed. 109, in which Mr. Chief Justice Fuller said (145; 116):

> "* * * we are not prepared to hold the Circuit Court should be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it."

That Respondents became actors cannot reasonably be questioned. Pursuant to the order of reference directed for the purpose of determining the parties entitled to distribution of the *res,* Respondents, at a hearing regularly held by the Special Master as a part of the proceedings in the Primary Cause, presented formal proofs of claim, procured them to be made a part of the record, and presented evidence in support of them (R. 36, 4, 6, 10, 13). Thereby they came into the cause to gain the benefit and avail themselves of the advantages of the decree creating the fund in which they seek to share. The course they pursued is the exact legal equivalent of an action against Tower Hill had there been no receivership. In such contingency, they would have exposed themselves to the risk of counterclaim and set-off. Having presented their claims, or in legal effect instituted their suits, the Ancillary Bill is but a method of bringing the counter demands of Tower Hill, now represented by Receivers, on the Record.

The lone respect in which the case of *Merchants Heat & Light Co. v. James B. Clow & Sons, supra,* differs from the one at bar is that in the former the defendant was not bound to plead the counterclaim, while here Respondents, if they elected to enforce their claims, were bound to come into the District Court. That this distinction is without legal effect a moment's reflection will readily show.

The law vesting the District Court with jurisdiction to administer the *res* and to determine claims to participate in its distribution is what required Respondents to go into that tribunal. That law deprives them of no right and leaves them perfectly free to go in or stay out, just as before the receivership they were free to sue or not to sue as they chose. The only effect of the receivership was to restrict the tribunals in which

they otherwise could have asserted their claims to the particular one having custody of the *res*.

Had there been no receivership, they could have sued in any Court having jurisdiction, federal or state, but they would have run the risk of counterclaim and set off, exactly as is set up in the Ancillary Bill, and to hold, as they now contend, that the result of the receivership is to afford them an immunity they otherwise would not have had, is to defeat the very purpose of the law vesting a court having possession of a *res* with power to determine the liability of third persons to it.

Whether the District Court should adjudicate Tower Hill's claim against Respondents was a matter of choice with them. Respondents were not obliged to invoke its jurisdiction, and Petitioners were powerless to compel them to do so.

Just as does any suitor, they decided to proceed and thereby subjected themselves to the dangers incident to such a course—in this instance the hazard of having it judicially determined that instead of their having a right to receive a portion of the Tower Hill *res* in distribution, they were actually liable to account to the receivership estate for the part of the *res* held by them. They knew the worth of their demands and the strength of the counter charges against them, and their choice to move to enforce the former was but an election to pit them against the latter.

Commercial E. S. Co. v. Curtis, 288 Fed. 657;
Circuit Court of Appeals, Eighth Circuit.

On May 4, 1920, a receiver of the properties and assets of the Commercial Electrical Supply Company was appointed upon a general creditor's bill. On June 6, 1920, Curtis filed an intervening petition and a veri-

fied claim asserting that the Supply Company was indebted to him but claiming no lien upon the receivership assets. On January 6, 1921, the trustees under mortgages upon the receivership property intervened and sought foreclosure of their mortgages. On October 3, 1921, a decree of foreclosure was entered, followed by a substituted decree of foreclosure entered November 28, 1921. Subsequent to the entry of these decrees of foreclosure, Curtis filed an amended intervening petition in which he asserted facts to show that his claim was prior in right and lien to the lien of the foreclosed mortgages. The question before the court was whether he was bound by the decrees of foreclosure and, consequently, precluded from asserting the lien alleged in the intervening petition. The Court below held that Curtis was concluded by the foreclosure decrees. In affirming that decree, the Circuit Court of Appeals, in an opinion by Judge Sanborn, said (659):

> "It is the general rule that one who voluntarily intervenes in a suit in equity thereby becomes a party to the suit, is in the same situation, bound by the same orders and decrees, and subject to the same estoppels, as though he had been a party from the commencement thereof. * * *
>
> "Counsel for the claimant stated in their reply brief that the claimant filed an intervening petition in the suit on June 6, 1920, and the court assumes that to be the fact. The record contains no copy of that petition. It does, however, contain a copy of a verified claim of the claimant filed on that day with the receiver, wherein no lien, estoppel, or superior equity was claimed, and the receiver subsequently classified that claim and reported it to the court as an open account for which no lien was claimed. The voluntary filing of this verified claim

and of this intervening petition in the equity suit on June 6, 1920, made the claimant thenceforth a party to this suit in equity, charged it with notice of all proceedings therein, bound it by all the orders and decrees thereof, and vested it with the right to appeal from the final decrees if it felt aggrieved thereby."

In an opinion by Mr. Chief Justice Fuller in *Rouse v. Letcher,* 156 U. S. 47; 39 L. Ed. 341, this Court held that a person having a claim to share in the distribution of receivership assets was properly allowed to intervene and prove her claim, and it is indicated that the assertion of the right to share in the assets is in essence an intervention in the receivership proceeding.

It is clear that intervention is not dependent on the form in which it is brought about and that any act effective to establish a claim against the receivership assets amounts to an intervention.

In *Rouse v. Letcher, supra,* the claim of the intervenor was referred to a Special Master to be heard, subject to exceptions to be filed in court. In the case at bar, the Special Master was appointed to hear, determine and report to the Court all claims that might be presented without the precedent formality of a technical petition to intervene. The order of reference dispensed with the necessity of securing leave to present their claims, and when Respondents, under that order, presented and filed their claims, they were in exactly the same situation as if they had done so after intervention granted on their formal application.

Stewart et al. v. Dunham et al., 115 U. S. 61; 29 L. Ed. 329. Mr. Justice Matthews there said (64; 330):

"* * * The right of the court to proceed to decree between the appellants and the new parties did not

depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely matter of form whether the new parties should come in as co-complainants or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

If Judge Northcott, in writing the opinion under review, had adhered more strictly to the principles stated by him in *Massachusetts Bonding and Insurance Co. v. Concrete Steel Bridge Co.*, 37 Fed. (2d) 695, a different result would have obtained. He there said (701):

> "It is held in the state courts of West Virginia that by appearance in an action for any other purpose than to take advantage of defective process or service thereof a defendant waives all objections which he might otherwise have to the writ or service. *State v. Coal Co.*, 49 W. Va. 143, 38 S. E. 539; *Fulton v. Ramsey*, 67 W. Va. 321, 68 S. E. 381, 140 Am. St. Rep. 969; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761."

He cites and quotes with approval *Dailey Motor Co. v. Reaves*, 184 N. C. 260; 114 S. E. 175, 176, in which the Supreme Court of that State said:

"Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general."

Fulton v. Ramsey, 67 W. Va. 321.

The Supreme Court of that State dealt with a question whether or not a certain motion or order shown by the record was a general appearance. That Court, in an opinion by Judge Poffenbarger, held that it was nothing more than an inquiry addressed to the court for information as to what could be done by way of obtaining a postponement of the cause, and ruled that it was not a general appearance. In considering the requisites of such an appearance, Judge Poffenbarger said (326):

"No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or participated in some step taken therein."

And again (327):

"The instances of the assumption of the role of actor in a suit, disclosed by the federal decisions, are such as the taking of a continuance; filing a demurrer to plaintiff's pleadings, without limiting it to the question of jurisdiction; filing a plea of intervention; pleading to issue or to the merits in the first instance; or filing sets-off, counter-claims or notices of recoupment."

Judge Poffenbarger further says (328):

> "These precedents amply sustain the view that something substantially beneficial to the defendant or detrimental to the plaintiff, relating to or affecting the progress of the cause, asked, done or accepted by the former, is essential to the establishment of a waiver of process or service thereof. There must be something more than a mere pretext for the claim of jurisdiction over him. He must either enter an appearance, ask some relief in the cause, accept some benefit as a step therein or do something from which the necessary implication of submission to the jurisdiction of the court over his person arises."

Holding that the order was an appearance, Judges Brannon and Williams dissented, and the former, in a vigorous opinion, cited and quoted *Frank v. Zeigler,* 46 W. Va. 614, the authority of which was not questioned by the majority (331):

> " 'If a party appear in a suit for any purpose other than to object to the legality of process or its service, it is a general, not a special, appearance, and dispenses with service of process'."

Arnold & Ruffner v. Casner, 22 W. Va. 444.

In point 3 of the syllabus it is said:

> "Creditors who file their claims before the commissioner in such a suit (creditors' bill), although not formal parties to the bill, become informal parties to the suit and are as effectually bound, and the court has the same jurisdiction over them, as if they had been made formal parties to the bill and been served with process."

In that case, the lower Court had ruled that persons proving claims in the cause were not parties thereto or bound by decrees therein. This contention was overruled by the Supreme Court. In its opinion it said:

> "The usual course is to publish a notice convening the creditors and thereby informally making them parties. And such informal parties have the same control and right to file and have their claims adjudicated in the cause as if they had been formally by name or as a class made parties, and upon filing their claims before the commissioner they become bound by the proceedings in the cause as fully as the most formal parties.

The Casner case continues to be the law of West Virginia: *Bilmyer v. Sherman,* 23 W. Va. 656; *Wyatt v. Smith,* 25 W. Va. 813; *Bent v. Read,* 82 W. Va. 680.

Newman v. Moore, 94 Kentucky, 147.

The Supreme Court of that State said (148):

> "But she filed exceptions in open court to the commissioner's report, fixing the amount coming to Newman, which were sustained by the court, and as she thus took part in the trial, and by her exceptions combated the claim set up in Newman's action, she cannot be allowed to say that she was not in court. She cannot appear in court and attempt to defeat the purpose sought to be effected by the cross-petition, and yet shelter herself behind the plea that she has not been summoned. We think she thereby entered her appearance."

It cannot be denied that Respondents are in court for the purpose of obtaining affirmative relief. This they seek through the medium and in virtue of the cause

into which they have voluntarily come. If it is a settled principle that the seeking of affirmative relief constitutes the seeker an actor and a party to the cause in which the relief is sought, it cannot well be asserted that Respondents are not parties to the receivership cause.

There is admittedly a controversy between Respondents and the receivership estate, represented by Petitioners, as to whether Respondents are entitled to receive a part of the *res* or, on the contrary, are required to make contribution thereto. Of at least a part of this controversy, the District Court had undoubted jurisdiction, which Respondents invoked, and the governing principle in such case is well expressed by Mr. Chief Justice Taft in *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612, in which he said (217; 616):

> "* * * Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide the whole issues and award complete relief even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law."

(b) Equity Rule 30.

The second paragraph of this Rule is—

> "The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up,

shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims."

American Mills Co. v. American Surety Co. of New York, 260 U. S. 360; 67 L. Ed. 306. This Court, by Mr. *Chief* Justice Taft, said (364, 309):

"The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of."

After holding that a defendant, notwithstanding that the set-off or counterclaim arose out of a transaction which is the subject matter of the suit, was not required to plead the counterclaim unless it was of a character cognizable in equity, the Chief Justice continued—

"* * * The counterclaim referred to in the first part of the paragraph (Equity Rule 30) must therefore be an equitable counterclaim—one which, like the set-off or counterclaim referred to in the next clause, could be made the subject of an independent bill in equity. The counterclaim and the set-off and counterclaim in the two clauses are in *pari materia* except that the first grows out of the subject-matter of the bill and the other does not. That which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation. That which does not may be set up, if the defendant wishes, in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding, even though they are not related. *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91. The formality of cross bills is not required, and the rule goes as far as possible to facilitate the

prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative."

Buffalo Specialty Co. v. Van Cleef, 217 Fed. 91, which was cited with approval by Mr. Chief Justice Taft. In that case the Court said (93):

"It will be seen that Rule 30 requires defendant to set up any counterclaim which arises out of the transaction forming the subject-matter of the bill, but allows without requiring him to set up any equitable counterclaim or set off which might be the subject of an independent suit by defendant against plaintiff. The language is perfectly clear: If defendant has an independent cause of action in equity against plaintiff, he may counterclaim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court, in adopting the rule, omitted the last clause of the English rule which restricts counterclaims to those which can be conveniently disposed of and those which ought to be allowed. Not only was any set-off or counterclaim which may be the subject of an independent suit included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action, wholly unconnected with the claim of the plaintiff, may be counterclaimed."

Since Respondents, by assertion of their claims in the receivership proceeding, are seeking affirmative relief against the *res,* their demands, without regard to the form in which they are cast, are in essence bills in

equity against Tower Hill, and the Ancillary Bill, notwithstanding its form, is likewise in essence an answer setting up counterclaims, which, although they might have been the basis of an independent bill, are still within the express terms of Equity Rule 30.

If "the new Equity Rules were intended to simplify equity pleading and practice" and Rule 30 "goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants," Petitioners respectfully submit that the very purpose of the Rule requires the District Court to adjudicate not only Respondents' right to participate in the *res* but their liability to account to the *res*, and to settle in one proceeding all controversies between Petitioners and Respondents respecting the *res*.

The application of Equity Rule 30 to this case is well stated by Judge Soper in his dissenting opinion (75 Fed. (2d) 457; R. 75):

> "Furthermore, there seems to be no important reason why Equity Rule 30, promulgated November 4, 1912, (28 U. S. C. A. § 723) should not be applied to the situation which arises when a receiver has a set-off or counterclaim in equity, growing out of an independent transaction, against a claimant. This rule provides in substance that the defendant in his answer to a suit in equity may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim shall have the same effect as a cross suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the counterclaim. By the passage of this rule, the Supreme Court, in

order to make it possible to put an end to all controversies between the same parties in a single suit, changed the former practice which confined set-offs and counterclaims to those which arose out of the transaction that formed the basis of the original suit. Since the filing of a disputed claim against a receiver in an equity proceeding is in one aspect a separate suit, it falls within the scope of Equity Rule No. 30, and the receiver should have the same right to set-off or counterclaim as would have been accorded to the corporation before the receiver was appointed."

Petitioners respectfully submit that this wise and practical exposition of Equity Rule 30 is legally sound and that it is not answered or avoided in any way by the majority opinion of the Circuit Court of Appeals.

That the counterclaims against Respondents were asserted by Receivers in the form of an Ancillary Bill instead of by answers to Respondents' claims as pleaded before the Master is not a sufficient reason for refusal to apply the provisions of Equity Rule 30, has been decided in principle by this Court in *Young v. McNeal-Edwards Company,* 283 U. S. 398, 75 L. Ed. 1140. The McNeal Company, a Virginia corporation, sold the Young Company, a Massachusetts corporation, 1107 drums of oil, buyers to return the drums. The Massachusetts corporation sued the Virginia corporation in the United States District Court of Massachusetts for breach of warranty of quality and attached the drums. Later the Virginia corporation sued the Massachusetts corporation in the same Court for conversion of the drums. Still later the Massachusetts corporation discontinued its former action and brought a second suit against the Virginia corporation in the same court

for breach of warranty of quality and had the writ served upon the attorney of record in the Virginia corporation's suit. This service was pursuant to a Massachusetts statute which provided that "if an action is brought by a person not an inhabitant of the commonwealth * * * he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other", and that "the writ in such cross action may be served on the attorney of record for the plaintiff in the original action." The question in this Court was whether, under the Conformity Act and the Massachusetts statute, the District Court acquired jurisdiction over the Virginia corporation. This Court held that the Massachusetts statute, as it applied to the Virginia corporation, was only a slight extension of the doctrine of recoupment recognized in Massachusetts apart from statute and that the Massachusetts principle would be applied in the courts of the United States. In the opinion of this Court, Mr. Justice Holmes said (400, 1141):

> "* * * Giving the counterclaim the formality of a separate suit hardly is a sufficient reason for refusing to apply the local policy and law. *Arkwright Mills v. Aultman & T. Machinery Co.*, (C. C.) 128 Fed. 195, 196. Mr. Langdell observes that there is no necessity for such ceremony in the nature of things 'for, the plaintiff being already in court *qua* plaintiff by his own voluntary act, it is reasonable to treat him as being there for all the purposes for which justice to the defendant requires his presence.' *Langdell*, Eq. Pl. chap. 5, § 119. The characterization of the contrary doctrine as pernicious by Mr. Justice Miller in *Partridge v. Phoenix Mut. L. Ins. Co.*, 15 Wall. 573, 21 L. ed. 229, is repeated

in *Chicago & N. W. R. Co. v. Lindell,* 281 U. S. 14, 17, 74 L. ed. 670, 672, 50 S. Ct. 200. We see no reason to doubt the constitutionality of the present application of the state law. The policy of it is embodied in equity rule 30. See *Aldrich v. E. W. Blatchford & Co.,* 175 Mass. 369, 56 N. E. 700."

Mr. Justice Butler in *Chicago & N. W. R. Co. v. Lindell,* 281 U. S. 14; 74 L. Ed. 670, cited by Mr. Justice Holmes, said (17, 672):

> "The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the court's time and injustice."

In support of this, a number of cases are cited, among them *Partridge v. Phoenix Mut. L. Ins. Co.,* 15 Wall. 573; 21 L. Ed. 229, referred to by Mr. Justice Holmes, from which Mr. Justice Butler quotes the language of Mr. Justice Miller (17; 673):

> "It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same form."

(c) APPLICATION OF THESE PRINCIPLES.

In order to make direct application of the principles just discussed, it may be helpful to consider in some detail Respondents' participation in the Primary Cause.

In the Primary Cause, the District Court appointed a Special Master to "take, state and report an account and report to the Court showing" all the debts, obligations and claims against Tower Hill, and the owners of its preferred and common stock (R. 1, 2).

As directed by the order, the Special Master set a hearing at Charleston, West Virginia, for January 30, 1934, and gave the prescribed notice (R. 36).

At the hearing, Watson, one of the Respondents, attended in person and testified that he was an attorney at law, and was secretary and director of Hecla, and that Hecla owned 2037 shares of preferred stock and 2451 shares of common stock of Tower Hill (R. 36). He filed the certificates for these shares and, in connection with his testimony, filed Hecla's formal proof of claim marked "Proof of Claim of Hecla Coal & Coke Company as the Owner of Shares of the Preferred Stock and the Common Stock of the Tower Hill Connellsville Coke Company of West Virginia". This proof of claim (R. 4) is captioned in the Primary Cause and is addressed to "J. E. Campbell, Special Master in Chancery in the above proceedings". In it Hecla "files this its proof of claim with you, for the purpose of participating in any distribution or liquidating dividend paid by the Tower Hill Connellsville Coke Company of West Virginia or the Receivers thereof, to either its Preferred or its Common stockholders or to both".

After Watson retired from the stand, John T. Wilson was sworn and testified under examination by Wat-

son (R. 37). Who Wilson was the Record does not disclose, but it does appear that he had examined the books of Tower Hill. Under Watson's examination, he testified that Tower Hill's books showed that it owed Hillman $250.00 as salary for the month of October, 1933, and a like amount to Watson as salary for the same period.

The only purpose of this examination and testimony was to show that Hillman and Watson were creditors of Tower Hill, and to have the Master so find and report to the Court. Clearly, Watson was in court in person, seeking a distribution from the *res* on his own behalf, and as attorney for Hillman seeking distribution on his behalf.

In connection with his examination of Wilson, Watson tendered, and at his instance there were filed, the following additional proofs of claim, each of which is captioned in the Primary Cause and is addressed to "J. E. Campbell, Special Master in Chancery in the above proceedings" (R. 37).

(1) Proof of claim of Thomas Watson, marked "Proof of Claim of Thomas Watson", for professional services rendered (R. 6). In it Watson "files with you his Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the sum of $33,750.00" and concludes his proof with "Claimant respectfully asks that his claim as above set forth may be allowed against the Defendant Tower Hill Connellsville Coke Company of West Virginia" (R. 10).

(2) Proof of claim of Hillman Company, marked "Proof of Claim of Hillman Coal & Coke Company", for office expense and general overhead for the month of October 1933 (R. 10). In it Hill-

man Company "files with you its Proof of Claim against the Tower Hill Connellsville Coke Company of West Virginia in the amount of $2,720.03". In concluding its proof, it states "All of the assets of the defendant Tower Hill Connellsville Coke Company of West Virginia passed into the possession of its receivers on or about October 26, 1933, and consequently the above items remained due, owing and unpaid (R. 13).

(3) Proof of claim of Hillman and Sheets, marked "Proof of Claim of J. H. Hillman, Jr., and A. B. Sheets as Sureties upon the Supersedeas Bond of Tower Hill Connellsville Coke Company" (R. 13). This proof of claim is signed by Sheets individually and by Hillman "By Thos. Watson, Atty.", thereby clearly showing that Watson, in appearing before the Special Master and examining the witness Wilson, was appearing on behalf of Hillman.

The decree appointing Receivers in the Primary Cause brought within the jurisdiction of the District Court Tower Hill's entire assets of every character. It constituted them the *res* to be administered by the Court. That some of the assets did not come into the possession of the Receivers forthwith upon their appointment, but remained in the hands of third parties, did not withhold them from the jurisdiction of the District Court. The principle which is the basis of the ancillary jurisdiction of a receivership court is that the court is entitled to possession and administration of the entire *res* of the trust estate and, consequently and necessarily, may exercise any authority required to obtain such possession and fully to effect such administration, and in the exercise of such authority, it is unhampered by the limitations upon its jurisdiction existing in original actions.

That all these claims are equitable in character and properly cognizable in a court of equity is discussed in the succeeding section of the Argument. Clearly they are as much a part of the *res* as were the notes and accounts receivable in *White v. Ewing, supra,* and the unpaid stock subscription in *Peck v. Elliott, supra.*

How, then, upon controlling authority as well as in principle, can there be any question that the claims against Respondents are a part of the *res* or that the District Court has jurisdiction of the subject matter of the Ancillary Bill?

Merchants Heat & Light Co. v. James B. Clow & Sons, supra, is conclusive authority for the proposition that action for affirmative relief in a cause is submission to the jurisdiction of the court. In that case the defendant became an actor and, consequently, a party, because it asserted an affirmative defense by way of recoupment, notwithstanding that otherwise the court was without jurisdiction and the defendant was in court without sanction of law and against its protest. It might well have been said of that defendant that it was seeking only to protect its rights in a court which was not of its own choosing and into which it had been illegally brought, and yet this Court held that the minute it stepped over the line of pure defense and sought affirmative relief, even by way of defense, it submitted itself to the jurisdiction and became a party.

In the case at bar, the reason for the application of the principle is much stronger. Respondents are volunteers. They are in court at their own instance and for their own purposes. They affirmatively asserted claims, not by way of defense against anything sought from them, but in their desire to get something out of

the *res*. This was the situation which existed when the Ancillary Bill was filed. In it, the Petitioners merely sought to recover, for the benefit of the *res*, against claimants voluntarily appearing to participate in the *res*. To say that Respondents are not in court is to draw a distinction between an affirmative claim asserted by a defendant who has been illegally summoned and has protestingly appeared, and a like claim, freely asserted by one who has voluntarily appeared. There is no basis in reason for such distinction and none can be found in authority. In each instance, however the claimant got into court, he sought relief and was an actor, and, consequently, a party.

It is difficult to conceive of a situation where a person could more emphatically assume the role of an actor. Respondents are in reality intervenors, not to defend the action, but to enforce their personal claims.

If these parties had appeared in open court and presented their claims at a hearing before the Chancellor, their participation in the suit would be undoubted.

That the particular portion of the cause in which they took their action was before a Master and not the Chancellor in person, does not make a whit's difference. The cause was pending in the Court and what Respondents did before the Master, to whom there was due reference, is just as much a part of the cause as had it occurred in the presence of the Chancellor himself. The point is that by what they did, Respondents became actors in the cause, and it is immaterial whether it was by filing papers in the office of the Clerk, participating in hearings before the Master, or appearing before the Chancellor.

As has been often judicially said and as the cases already cited show, a person cannot be in court and out of court at will. For like reason, he cannot be in court for one purpose and out of court for cognate and allied purposes.

The position of Respondents is directly to the contrary. Summarized in a brief but accurate way, it is that they are in court to share in the assets, but out of court to keep from making their just contribution to the assets, and that they can come into court and take from other claimants what, were it not for their demands, such claimants would receive, but out of court when such claimants attempt to coerce them to discharge the just demands of the estate against them.

(3) The Claims Against Respondents.

It seems to Petitioners that the claims against Respondents are so clearly equitable in character that there can be no reasonable question but that they are the proper subject of counterclaim under Rule 30. The facts averred in the Ancillary Bill show that Respondents occupied a fiduciary relationship toward Tower Hill. They are called upon to explain certain transactions which by virtue of that relationship they caused Tower Hill to enter into, and if, as the Ancillary Bill avers, such transactions were fraudulent, to account to Tower Hill for the injuries caused by their lack of fidelity. Equity alone can unravel the complicated facts involved in these continuing transactions and place the blame where justice requires. However, the Circuit Court of Appeals implies, without specifically holding, that at least some of these claims may be legal and actionable only at law (75 Fed. (2d) 451, 455; R. 72), and in their answer to the petitions for certiorari Respond-

ents asserted that these claims are not equitable and that under the Seventh Amendment and Section 367 of the Judicial Code they are actionable only at law and cannot be the basis of counterclaims under Rule 30.

In view of the attitude of the Circuit Court of Appeals and the assertions of Respondents, Petitioners are led to consider these claims in greater detail than otherwise they would have felt justified.

(a) THE FACTS.

The Ancillary Bill sets up four claims. All of them are against the individual Respondents. One of them involves the Hillman Company and another Hecla.

The relationship of Hillman, Sheets and Watson to Tower Hill and to its subsidiary and affiliated corporations, which together constitute the Hillman Interests, and some of the transactions which are the basis of the claims against Respondents, were the subject of much testimony in the Primary Cause and were carefully considered by the District Court and upon two appeals by the Circuit Court of Appeals (33 Fed. (2d) 703; 64 Fed. (2d) 817).

(1) Claims Against Hillman, Sheets and Watson for Moneys Illegally Taken Under the Guise of Salaries.

These claims are set forth in Paragraphs 4 to 7, inclusive, of the Ancillary Bill (R. 41-43).

The properties and assets now owned by Tower Hill and in possession of Petitioners were formerly owned in part by Tower Hill Connellsville Coke Company, a Pennsylvania corporation, all of whose stock was owned

by Tower Hill, which is a West Virginia corporation, and in part by Eastern Coke Company, also a Pennsylvania corporation, all of whose stock was owned by Tower Hill of Pennsylvania. On July 30, 1929, during the pendency of the Primary Cause, Eastern Coke transferred all its properties and assets to Tower Hill of Pennsylvania, as a liquidating dividend, and on January 8, 1930, while the Primary Cause was still pending, Tower Hill of Pennsylvania, conveyed all its properties and assets to Tower Hill, the West Virginia corporation (64 Fed. (2d) 817, 819).

The claims against Hillman, Sheets and Watson are that during the period from May, 1920, to January, 1930, they appropriated from one or more of these corporations large sums of money under the guise of salaries as President, Vice President or Treasurer, and Secretary, respectively, and that these withdrawals were not authorized by any corporate action, were excessive in amount, and constituted illegal appropriations of the funds of these corporations.

The Ancillary Bill seeks the recovery of these funds. These claims involve (1) a breach by these individuals of their fiduciary relationship to these corporations as directors and officers; (2) the laws of West Virginia and Pennsylvania as to the legality of salaries to executive officers in the absence of corporate authorization; (3) an accounting by these individuals, if they are entitled to any compensation, as to the services rendered by them and an adjudication by the Court as to what, if any, compensation they were entitled to receive in view of these services and in the light of all the circumstances; and (4) to what extent, if any, each of these individuals may be liable for funds illegally taken under the guise of salaries by the others.

(2) THE EMERALD TRANSACTION.

The facts regarding this transaction and the basis of the claim against Hillman, Sheets and Watson on account thereof are set forth in Paragraphs 8 to 14, inclusive, of the Ancillary Bill (R. 43-45).

The charge is that without any corporate authorization, $1,184,000 of Tower Hill's funds were expended in the purchase of stock of Emerald Coal & Coke Company, of no market value and doubtful intrinsic worth. This transaction was in discharge of a personal obligation of Hillman. It was done at his instance, with the knowledge and consent of Sheets and Watson. As averred in the Ancillary Bill, this transaction is a plain breach of trust, and an accounting is sought for the injury done to Tower Hill.

The equitable character of this claim, as stated in the Ancillary Bill, appears from the opinion of the Circuit Court of Appeals on the former appeal (64 Fed. (2d) 817, 820, 823):

> "* * * The Emerald transaction alone proves conclusively the utter disregard, on the part of those dominating the Tower Hill of West Virginia, of the rights of the preferred stockholders, and a deliberate intention to trample upon those rights. Unless the 'arm of equity be shortened or palsied' it can certainly reach the trouble here and give to the plaintiffs that relief to which they are clearly entitled."

(3) The Claim Against Hillman Company

This claim is set forth in Paragraphs 15 to 27, inclusive, of the Ancillary Bill (R. 46-51).

Tower Hill and the Respondents, Hillman Company and Hecla, were three of a large number of corporations of which Hillman, Sheets and Watson were directors and of which they were, respectively, President, Vice President or Treasurer, and Secretary. Paragraph 15 of the Ancillary Bill (R. 46) charges that the majority directors and officers of these corporations were the same persons, and were the nominees and, for practical purposes, merely the employees of Hillman.

The claim is that at the direction of Hillman and with the acquiescence of Sheets and Watson, the Hillman Company acted as manager of a pooling arrangement under which the selling, office and operating expenses of these various corporations dominated by Hillman were pooled and prorated among the corporations in accordance with directions from time to time given by Hillman, Sheets and Watson, with the result that the payments exacted from Tower Hill on account of such expenses far exceeded the fair, reasonable and conscionable expenditures for such purposes, working to the detriment of Tower Hill and its stockholders and to the gain and advantage of Hillman, Sheets and Watson and their allied interests.

The Ancillary Bill seeks an accounting of the operation of this pooling arrangement and an adjudication as to the extent, if any, to which, under all the circumstances, Tower Hill should have been involved therein and should have contributed thereto, and for all moneys improperly taken from Tower Hill on account thereof,

recovery is sought against the Hillman Company and against Hillman, Sheets and Watson.

(4) The Hecla Transaction.

This transaction is the subject of the averments of paragraphs 28 to 35, inclusive, of the Ancillary Bill (R. 51-54).

The onus of this complaint is that Hecla, in selling and disposing of its property, was obliged to include certain property of Tower Hill and in the sale it was required to take over as part of the purchase price a worthless mine and coke plant known as Thompson No. 1. Hillman, Sheets and Watson, directors of both Hecla and Tower Hill, having a greater concern and larger interest in Hecla, compelled Tower Hill to accept the worthless plant.

The Ancillary Bill charges that if Tower Hill had been independently managed and directed, and had not been under the domination of Hillman, Tower Hill would not have had foisted upon it the practically worthless Thompson No. 1 Plant but would have received cash for the coal lands which it conveyed to the Weirton interests. An accounting is sought against Hillman, Sheets and Watson, who, as the common directors and officers of Tower Hill and Hecla, sacrificed the interests of Tower Hill for the benefit of Hecla, and against Hecla, as the majority stockholder of Tower Hill and the beneficiary of this breach of trust. This accounting involves not only the transaction as it was consumated in 1929 when the Thompson No. 1 Plant was conveyed to Tower Hill, but the credits and debits incident to the possession of Thompson No. 1 since that time. Petitioners' position is that in equity Thompson No. 1 was never owned

by Tower Hill and that a decree should now be entered against Hecla, Hillman, Sheets and Watson adjudicating that the Tower Hill receivership estate should be made whole, with like effect as if in 1929 Tower Hill had been paid in cash for the coal land conveyed to the Weirton interests, and that the Thompson No. 1 plant should be now conveyed to whomsoever the Court, under all the circumstances, may adjudicate should receive such conveyance.

This transaction is commented on in the opinion of the Circuit Court of Appeals upon a former appeal (64 Fed. (2d) 817, 819).

(b) THE LAW.

That the causes of action as thus outlined and set up in the Ancillary Bill are cognizable in a court in equity seems too rudimentary to require extended discussion or copious citation.

Officers, directors and majority stockholders who have appropriated to themselves the control of a corporation sustain a relationship to the corporation itself and to its stockholders that is fiduciary in character, demanding the utmost good faith and prohibiting any gain or profit for their advantage or aggrandizement. Although they are not technically trustees, because the title of the corporate property is not in them, courts in equity from the earliest days have regarded them as *quasi* trustees and have held them liable as if they were trustees on the theory that their failure to perform their duties *uberrima fide* is a breach of trust.

Equity has jurisdiction of all relationships of trust and confidence and entertains any complaint based on a breach thereof, even though only a monetary decree be sought.

In *Hornor v. Henning,* 93 U. S. 228, 23 L. Ed. 879, the Court had under consideration the Act of Congress, 16 Stat. at L. 98, authorizing the formation of corporations within the District of Columbia, which provides that if the indebtedness of the corporation should at any time exceed the amount of its capital stock, the trustees of the corporation assenting thereto should be personally and individually liable for such excess to the creditors of the corporation. An action at law, based on this statute, was brought by a creditor of the Washington City Savings Bank against its directors. In holding that the suit at law would not lie but that the remedy was in equity, Mr. Justice Miller, speaking for this Court, said (231; 880):

> "We are of opinion that the fair and reasonable construction of the Act is, that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that Congress intended that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it, in proportion to the amount of their debts, so far as may be necessary to pay these debts.
>
> "The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery."

A leading case dealing with the duties and liabilities of directors of a corporation is *Jackson v. Ludeling,* 88 U. S. 616; 22 L. Ed. 492, in which Mr. Justice Strong, speaking for this Court, said (624; 495):

"* * * All these parties were at hand, residents in or near Monroe. As officers of the Company they had the custody and charge of the railroad and all the property of the Corporation. And they held it in a very legitimate sense as trustees. Certainly they were the trustees of the stockholders, and also, to a considerable degree, of the bond holders, owners of the mortgage."

And again (625; 495):

"* * * They (the directors) had no right to enter into or participate in a combination, the object of which was to devest the Company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. They had no right to seek their own profit at the expense of the Company, its stockholders, or even its bond holders. Such a course was forbidden by their relation to the Company. It was their duty, to the extent of their power, to secure for all those whose interests were in their charge the highest possible price for the property which could be obtained for it at the sheriff's sale. They could not rightfully place themselves in a position in which their interests became adverse to those of either the stockholders or bond holders."

To the same effect is *Wardell v. Union Pacific Railroad Company*, 103 U. S. 651; 26 L. Ed. 509.

The comprehensive character of jurisdiction in equity when the matter of a trust or any fiduciary relationship is brought in question is discussed in the opinion of Mr. Justice Peckham in *Clews v. Jamieson*, 182 U. S. 461, 479; 45 L. Ed. 1183, 1193.

It has been consistently held that officers, directors and majority stockholders of a corporation occupy a fiduciary relationship to it and that a court in equity has jurisdiction to redress injuries suffered by the corporation through their breach of trust.

Jones v. Missouri-Edison Electric Co., 144 Fed. 765;
Wheeler v. Abilene National Bank Building Co., 159 Fed. 391;
Davis v. Pearce, 30 Fed. (2d) 85;
Moon Motor Car Co. v. Moon, 58 Fed. (2d) 90;
Wile et al. v. Burns Bros. et al., 2 Fed. Supp. 950;
Bosworth v. Allen, 168 N. Y. 157; 55 L. R. A. 751; 61 N. E. 163.

The pertinent parts of the opinions in these cases, together with a statement of the case in some instances, are printed in the Appendix.

(4) The Opinion of the Circuit Court of Appeals.

(a)

The Circuit Court of Appeals held that the question is whether the District Court acquired such jurisdiction over the persons of Respondents as authorized the granting of affirmative relief against them (75 Fed. (2d) 451, 453; R. 69). In answering this question in the negative, it is said (75 Fed. (2d) 451, 454; R. 69):

> "* * * The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause."

This does not accurately state what was done by Respondents. They did not file claims or proofs of claim

with the Receivers. They appeared personally or by counsel before the Special Master in the Primary Cause, presented claims, offered testimony in support of them, and sought decrees in their behalf.

The opinion cites (75 Fed. (2d) 451, 454; R. 69)—

Elkins v. First National Bank, 43 Fed. (2d) 777;
Acme White Lead & Color Works v. Republic Motor Truck Co., 285 Fed. 88;
Jones & Laughlins v. Sands, 79 Fed. 913;
Youtsey v. Hoffman, 108 Fed. 693;
Sands v. Greeley Co., 80 Fed. 195.

None of these cases, unless perhaps it be *Youtsey v. Hoffman,* involves the question of submission to jurisdiction.

The Elkins case denied a petition to intervene. The question was confined to distribution. Petitioners claimed that certain of the assets were imposed with a trust in their favor. It was held that they could present all their claims which were well pleaded before the special master, and that the petition did not show any of the funds to be impressed with a trust. Had it been so, said the Court, the question would have been different.

The Acme case is to the same effect. Intervention was denied because the petitioner could obtain full remedy before the master.

The Jones & Laughlins case involved a claim of a non-resident to participate in an ancillary receivership in which it was claimed that the residents of that State had priority. Jones & Laughlins petitioned to participate in the distribution on equality. It was denied.

The lower court, held that the issue could be determined by a proof of the claim and regular proceeding if it were denied. From that order an appeal was taken which was quashed because there was no final judgment.

The Greeley case is a petition of Jones & Laughlin to intervene in the cause referred to, in which intervention was denied because it could fully protect its claim in the manner indicated in the former case.

The Youtsey case is a District Court decision and proceeds on the theory that the receivers are not parties, and also holds that the claims attempted to be set up by the receivers were, under the controlling Kentucky statute, not counterclaims or set-offs. The question arose on a motion to remand and it appeared that no notice to charge him with liability had been given to Hoffman, who was the non-resident. Here it is conceded by Respondents and recognized by the Circuit Court of Appeals that Petitioners (Receivers) are parties. It could not have been held otherwise. They are enforcing the rights of the corporation itself, and there is none other legally enabled to do so. This is distinctly recognized in *White v. Ewing, supra; Peck v. Elliott, supra,* and many other cases. Furthermore, the court in the Youtsey case held that the claim there asserted was not a counterclaim or set-off within the meaning of the controlling Kentucky statute, while here the claims asserted by Petitioners are clearly within the meaning of Rule 30.

The Circuit Court of Appeals also referred to *Whelan v. Enterprise Transportation Co.,* 164 Fed. 95 (75 Fed. (2d) 451, 454; R. 69). The court there declined to follow *Peck v. Elliott, supra,* because the counterclaim was a legal one and not cognizable in equity. That question is here irrelevant for, as already discussed, every

cause of action set up in the Ancillary Bill is of purely equitable character and a court in equity would have jurisdiction wholly regardless of the receivership.

(b)

The Circuit Court of Appeals also held that when an ancillary bill brings in new parties they must be properly served with process to give the court jurisdiction (75 Fed. (2d) 451, 454; R. 69) and cites cases. Petitioners do not dispute that proposition, but their position, as accurately stated by the learned Judge of the District Court (R. 23) and already fully discussed, is that it is inapplicable because the Respondents are already in court and therefore no question of bringing them in is involved.

(c)

The opinion says (75 Fed. (2d) 451, 455; R. 73):

> "The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with respect to independent claims against them which the receivers may seek to assert by way of counterclaim."

As heretofore shown, all the counterclaims asserted by Petitioners are equitable in character, and no question of right to jury trial is involved.

(d)

Finally, the opinion states (75 Fed. (2d) 451, 455; R. 71):

> "One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity."

because, as is said, he is not a court of his own choosing, but in a court selected by others.

As formerly pointed out, Respondents did not merely file claims with the Receivers, but came into the receivership proceeding, filed formal proofs of claim and presented evidence in support of them. The Circuit Court of Appeals wholly disregarded that fact.

It is the law, and not any selection of Tower Hill or its Receivers or any other person, that vests in the District Court of the United States for the Southern District of West Virginia exclusive jurisdiction of claims against Tower Hill. It is just as competent for the law to restrict a claimant to one tribunal as it is for the law to enable him, in certain circumstances, to have a limited choice of two or more.

Whether Respondents would go in or stay out of the District Court was purely volitional. If it be said that they would have stayed out at the risk of losing their claims, the answer is that they would have been in no different position than any other suitor. If the law decrees that there is but one tribunal open to a suitor, he must enter that court and assume the risk of counterclaim or abandon his own claim. If by reason of exceptional circumstances more than one tribunal is open to him, he still must make his election. Will he abandon his claim or will he run the risk of counterclaim in the court in which he determines to assert his own claim? In any event, if he elects to assert his claim he must face the risk of counterclaim in a court in which the law prescribes the defendant may be sued.

Petitioners respectfully submit that in appearing before the Special Master in the District Court and asserting their claims, Respondents were in no differ-

ent position than if they had filed a bill in equity against Tower Hill in a court in which the law prescribed Tower Hill could be sued. When the receivership of Tower Hill occurred and thereby there was vested in the receivership court the exclusive jurisdiction over claims against it, Respondents were in exactly the position of one who has a claim against another. Respondents could assert their claims where the law prescribed Tower Hill and its assets could be found but in so doing they would assume the risk of whatever result their action entailed. They could abandon their claims, and if the Receivers pursued them in a court to whose process they were subject, they could there assert their own claims as counterclaims. They chose the former course, and while the Circuit Court of Appeals properly recognized their just right to appear in the District Court, fully establish their own claims, challenge the claims of others, appeal from any decision of the Chancellor, and participate in the distribution of the assets in accordance with the final decree, it granted them exemption from liability to counterclaim. The result, it seems to Petitioners, is not in harmony with precedent or principle. Whether Respondents be termed formal parties or *quasi* parties or by whatever other term they may be designated, the fact remains that they are in the receivership court asserting claims against Tower Hill and seeking distributions from its funds just as fully, for any and every purpose, as if they had filed a bill in equity against Tower Hill.

(c)

Reference is made in the opinion to *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430; 77 L. Ed. 408, in which Mr. Justice Butler said (435; 413):

> "The setting up of a counterclaim against one already in a court of his own choosing is very dif-

ferent, in respect to venue, from haling him into that court."

In that case the plaintiff asserted that he was not liable to counterclaim because, upon the grounds of venue, he could not have been sued upon the counterclaim in an original action in that court. This Court held that Section 48 of the Judicial Code, defining venue in patent cases, had no application to a counterclaim against a plaintiff already in court. The case, Petitioners submit, in no way sustains the proposition for which it is cited by the Circuit Court of Appeals, but to the extent that it is relevant, it is favorable to their contention.

Petitioners, with due respect, submit that for the reasons herein presented, Respondents, by coming into the pending cause, proving their claims and seeking the advantages of the decree, submitted to the jurisdiction of the District Court for the adjudication of equitable counterclaims asserted by Petitioners, and that the decree dismissing the Ancillary Bill should be reversed and the Record remanded with directions to reinstate the Ancillary Bill and proceed to a final decree.

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APPENDIX.

Clews v. Jamieson, 182 U. S. 461; 45 L. Ed. 1183.

Mr. Justice Peckham said (479; 1193):

"Pomeroy in his work on Equity Jurisprudence, second edition, instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume 1, at § 151, he says: 'The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace, not only lands, but chattels, funds of every kind, things in action, and moneys.'

"All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as a trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest, or estate of the *cestui que trust,* and will compel the trustee to do all the specific acts

required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum or involves an accounting by the trustee for all that he has done in pursuance of the trust, and the distribution of the trust moneys among all the beneficiaries who are entitled to share therein.' 1 Pom. Eq. Jur. § 158.

"In cases where the equity doctrine of trusts has been extended so as to embrace other relations of a fiduciary kind, while it may not be said that a court of equity possesses exclusive jurisdiction, yet it is well settled that in such case there is so much of the trust character between the parties so situated that the jurisdiction of equity, though not exclusive, is acknowledged. 1 Pom. Eq. Jur. § 157.

"In *Foley v. Hill*, 2 H. L. Cas. 28, a question arose over that sort of relation which exists between a banker and his depositor, and it was held to be merely that of debtor and creditor. The court added, however, that, as between principal and factor, an equitable jurisdiction attached, because the latter partook of the character of a trustee, and that 'so it is with regard to an agent dealing with any property. * * * And though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction,' and therefore equity has jurisdiction.

"In *Marvin v. Brooks*, 94 N. Y. 71, it was held that an agent who had been intrusted with his principal's money to be expended for a specific purpose might be required to account in equity, and that upon such an accounting the burden was upon him to show that his trust duties had been per-

formed and the manner of their performance. The jurisdiction was placed upon the ground of a fiduciary or trust relation, and it was held that a court of equity had jurisdiction over trusts and those fiduciary relations which partake of that character, and in such cases the right to an accounting is well established; but it was held that the existence of a bare agency was not sufficient. It must be an agency coupled with some distinct duty on the part of the agent in relation to funds or some specific property.

"In 2 Story's Eq. Jur. 12th ed. it is stated, at § 975a, that in general a trustee is suable in equity in regard to any matters touching the trust.

"In *Oelrichs v. Spain,* 15 Wall. 211, 228, sub nom. *Oelrichs v. Williams,* 21 L. ed. 43, 44, the court remarked that there being an element of trust in the case, that element, wherever it exists, always confers jurisdiction in equity."

Jones v. Missouri-Edison Elec. Co., 144 Fed. 765.
Circuit Court of Appeals, Eighth Circuit.

After reviewing the relationship between the officers and directors of a corporation and the corporation and its stockholders, Judge Sanborn said (771):

"• • • It creates such a fiduciary relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit at the expense of others who have the same rights,"

and regarding jurisdiction in equity, he said (771):

"• • • Any sale of the corporate property to themselves, and disposition by them of the corporation or of its property to deprive the minority hold-

ers of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery."

Wheeler v. Abilene National Bank Building Co.,
159 Fed. 391.
Circuit Court of Appeals, Eighth Circuit.

Judge Sanborn said (393):

"The question which this case presents is: May the holder of the majority of the stock of a corporation make a sale to himself, unassailable in equity, of all the property of the corporation for its fair value, when he knows that that value is only five-sevenths of the amount which the corporation can obtain for it. It is not material to the determination of this issue whether the notice of the stockholders' meeting specified, or failed to state, that the question of the confirmation of the sale to Southworth would be there considered, or whether, or not the other proceedings of the defendants complied with the requirements of the law; and for the purposes of this decision it will be conceded, but it is not decided, that all the proceedings of the parties and of the corporation were in strict accordance with the forms of law. The objection to this sale lies deeper. It is that it was violative of the duty of a fiduciary.

A corporation holds its property in trust for its stockholders. The stockholders have a joint interest in the same property and in the same title. Community of interest in a common property or title imposes a community of duty and a mutual obligation to do nothing to impair either. It creates

such a fiducial relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit, to the detriment of others who have the same rights. *Jackson v. Ludeling*, 21 Wall. 616, 622, 22 L. Ed. 492; *Jones v. Missouri Edison Electric Co.*, 144 Fed. 765, 771; 75 C. C. A. 631, 637; *Booker v. Crocker*, 132 Fed. 7, 8, 65 C. C. A. 627, 628.

The holder of the majority of the stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock. He draws to himself and uses all the powers of the corporation. In effect he holds an irrevocable power of attorney from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. Times, places, and notices of meetings of the directors and of meetings of stockholders become of secondary importance, because the presence, the vote, and the protest of holders of the minority of the stock are unavailing against the will of the holder of the majority. They can act and contract regarding the corporate property, they can preserve and protect their interests in it, only through him and through the courts.

This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to

protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another, or any other act in his interest to the detriment of the holders of the minority of the stock, becomes a breach of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and invokes plenary relief from a court of chancery. *Jackson v. Ludeling,* 21 Wall. 616, 622, 22 L. Ed. 492; *Jones v. Missouri Edison Electric Co.,* 144 Fed. 765, 771, 75 C. C. A. 631, 637; *Burnes v. Burnes,* 137, Fed. 781, 790; 70 C. C. A. 357, 366; *McCourt v. Singers-Bigger,* 145 Fed. 103, 107, 76 C. C. A. 73, 77; *Pepper v. Addicks* (C. C.) 153 Fed. 383, 405; *Wardell v. Railroad Company,* 103 U. S. 651, 658, 26 L. Ed. 509; *Menier v. Hooper's Telegraph Works,* 9 Ch. App. Cas. 350, 352, 353; *Goodin v. Cincinnati & Whitewater Canal Co.,* 18 Ohio St. 169, 182, 183, 98 Am. Dec. 95; *Ervin v. Oregon Ry. & Nav. Co.* (C. C.) 20 Fed. 577, 580 Id., 27 Fed. 625, 632; *2 Story's Eq. Jur.* §§ 1261, 1262,; *Sage v. Culver,* 147 N. Y. 241, 247, 41 N. E. 513; *Farmers' Loan & Trust Co. v. N. Y., etc. R. R. Co.,* 150 N. Y. 410, 425, 430, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; *Hinds v. Fishkill, etc., Gas Co.* (Sup.) 88 N. Y. Supp. 954, 957; *Meeker v. Winthrop Iron Co.* (C. C.) 17 Fed. 48; *Sidell v. Missouri Pac. R. Co.,* 78 Fed. 724, 727, 24 C. C. A. 216, 219; *Barr v. N. Y., L. E. & W. R. R. Co.,* 96 N. Y. 444, 449, 451, 456; *Wright v. Oroville M. Co.,* 40 Cal. 20, 27; *Pondir v. N. Y., L. E. & W. R. R. Co.,* 72 Hun, 384, 390, 25 N. Y. Supp. 560; *Gregory v. Patchett,* 33 Beavan, 595, 607; *Meyer v. Staten Island Ry. Co.,* 7 N. Y. St. Rep. 245, 248. The rea-

son for this rule is the detriment to the holders of the minority of the stock from such sales and transactions, and not the benefit the holder of the majority derives therefrom. *Symmes v. Union Trust Co.* (C. C.) 60 Fed. 830, 865; *Memphis & Charleston R. R. Co. v. Woods,* 88 Ala. 641, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81. It is the duty of the master of the corporation who sells its property to procure the highest possible price for it (*Jackson v. Ludeling,* 21 Wall. 616, 625, 22 L. Ed. 492); and, if he sells it to himself for less, the sale is voidable by the holders of the minority of the stock at their option, although he paid the fair market value for it. *Miller v. Brown,* 1 Neb. (Unof.) 754, 95 N. W. 797."

Davis v. Pearce, 30 Fed. (2d) 85.
Circuit Court of Appeals, Eighth Circuit.

Judge Booth said (88):

"It is unquestionably the law that the directors of a corporation occupy a fiduciary relationship to the corporation and its stockholders. In the management of the corporate affairs, the directors are required to act in the utmost good faith. They are not allowed to make a personal profit at the expense of the corporation or its stockholders. Where they have entered into a transaction in violation of these principles, and a profit has been made, equity will compel them to account therefor to the corporation. The books are full of cases involving the application of these principles to many different states of facts. Many such cases have been cited, among them the following (cases cited).

"They have all been thoughtfully considered. From the numerous authorities there may be deduced the following tests to be applied where the

conduct of a director of a corporation is called in question in a court of equity: Do the actions or omissions show a lack of the highest good faith on the part of the director toward the corporation and the stockholders? Has the director made for himself out of a transaction a profit which by proper effort on his part could have been obtained for the corporation?"

Moon Motor Car Co. v. Moon, 58 Fed. (2d) 90.
Circuit Court of Appeals, Eighth Circuit.

An action at law was brought by the Motor Car Company against its officers for moneys claimed to have been wrongfully taken by them from its treasury under the guise of salaries. At the close of plaintiff's case, the court, upon motions, instructed verdicts for defendants. Upon appeal, the judgment was reversed and it was held that the remedy was in equity. Judge Kenyon said (92):

"If this action had been one for an accounting, as it apparently should have been, *Providence Min. & Mill. Co. v. Nicholson et al.* (C. C. A.) 178 F. 29; *Davenport Oil Co. v. Davenport* (C. C. A.) 23 F. (2d) 191, the evidence would seem sufficient to call for explanation from defendants and some proof of their authority to draw this money from the treasury of plaintiff."

And again (93):

"We think this case should have been brought on the equity side of the docket. If we were satisfied, however, that the result reached at law was correct and the same as should be reached in equity, it would be useless, of course, to reverse the judgment and remand it for a trial in equity."

The Court of Appeals held that the result reached at law was not correct, reversed the judgment and remanded the case with directions that it be tried in equity.

Wile et al. v. Burns Bros., et al., 2 Fed. Supp. 950. District Court, Southern District of New York.

Judge Coxe cited and quoted from the opinion of Mr. Justice Hatch in *Mabon v. Miller*, 80 N. Y. S. 979 (984) in which the grounds of equitable jurisdiction are cogently stated (951):

"* * * It is no objection to the complaint that the defendants may not be all equally culpable, or equally liable to respond in damages or otherwise to account for the property which has been misappropriated. * * * There may be many breaches, but they are of a single duty. There may be different trustees, but they deal with the same matter. There may be different degrees of participation in the disposition of the property, but the dealings are had with the property of the corporation, and the duty in such dealing is owed by the trustee to it. Consequently, the act which furnishes the ground of action is the breach of duty; and an accounting is asked of the property affected by such breach, together with the damages which flow therefrom. The whole cause of action is, therefore, single; and the fact that all of the directors may not have acted at a given time, or have been guilty of the same waste, or involved in the same measure of damage inflicted upon the corporation, is of no consequence. To the extent that they have been guilty of wrongful acts whereby property has been dissipated, for such acts and property they may be called upon to account; and variance in degree of acts, or culpability, or property wasted, or damage

sustained, does not make different causes of action. Equity lays hold of the entire transaction, and is invested with power in a single equitable action to submit each and every action of the directors to scrutiny, and award such judgment as is consonant with the facts and will remedy the wrong, and may determine therein the liability of each director for his culpable act."

Bosworth v. Allen, 168 N. Y. 157; 55 L. R. A. 751; 61 N. E. 163.
Court of Appeals of New York.

The defendants, Allen and others, were officers and directors of a Loan Association and Allen was also its attorney. Without the knowledge or consent of the stockholders, the defendants conspired with White and others to elect them as directors of the corporation. In consideration of this agreement, White and his associates were to pay defendants for their stock a sum in excess of its value, were to have the corporation employ Allen as its counsel for a period of time, and were to pay the defendants a bonus of about $18,000. The agreement was carried out. White and his associates were elected directors and officers of the corporation. The defendants' stock was purchased at the agreed price, Allen was retained as counsel and the bonus was paid defendants. Under what was claimed to be the mismanagement of the corporation by White and his associates, the corporation sustained losses. The corporation later repudiated the contract employing Allen as its counsel but he insisted that it still remained in effect. A bill was filed by the corporation against Allen and the former officers and directors who had entered into this agreement with White and his associates. It charged the facts above stated. The re-

lief sought was a cancellation of the contract under which Allen was retained as the corporation's counsel, an accounting and payment of all moneys received by the defendants on account of the transactions complained of, and an ascertainment of the damages suffered by the corporation on account of the wrongful acts of the defendants. The defendants demurred on the ground that the bill set forth several causes of action, some in contract and some in tort, for some of which at least there was an adequate remedy at law. The court below sustained the demurrers. The court of appeals reversed in an opinion by Justice Vann, in which he said (761):

"The defendants conspired to wreck the corporation of which they were directors, and to thereby make money for themselves. Although they sustained a relation of trust to the corporation, and were bound to promote its interests and protect its property, they entered into a combination to destroy it in order to enrich themselves. While not technically trustees, for the title of the corporate property was in the corporation itself, they were charged with the duties and subject to the liabilities of trustees. Clothed with the power of controlling the property and managing the affairs of the corporation, without let or hindrance, as to third persons they were its agents, but as to the corporation itself equity holds them liable as trustees. (Authorities cited). While courts of law generally treat the directors as agents, courts of equity treat them as trustees, and hold them to a strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct. (Cases cited).

The corporation itself had the right to call the directors to account, and such was originally the form of the action before us; but since the trial

a receiver has been appointed and substituted as plaintiff herein. While detached portions of the complaint, when read by themselves, would support several causes of action, when all the allegations are considered together we find but two,—one an action against trustees, or those liable as trustees, for an accounting; and another, incidental thereto and consistent therewith, arising out of the same transaction, and belonging to the same class, to wit, an action to set aside a written contract entered into through the defendants, as trustees, pursuant to the same fraudulent conspiracy upon which the main cause of action is founded. Both rest upon the same equitable principle, although one depends upon a single overt act and the other upon many, committed in carrying the conspiracy into effect. That principle is that the directors of a corporation are charged with the duties of trustees and bound to care for its property and manage its affairs in good faith, and for a violation of that duty, resulting in waste of its assets, injury to its property or unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees. The corporation has the right to call upon them to account, not only for all the property intrusted to their care, but also for all moneys furtively made by them at its expense. It is the peculiar province of courts of equity to supervise the execution of trusts, and to call trustees to an accounting for their management of trust estates, and especially for every violation of their primary duty not to deal with trust property for their own advantage. *Hiscock v. Lacy,* 9 Misc. 578, 30 N. Y. Supp. 860; *Husted v. Thomson,* 158 N. Y. 328, 335, 53 N. E. 20. Equitable jurisdiction extends to all culpable acts and omissions of the directors by which the pecu-

niary interests of the corporation are or may be injured. If they are treacherous to its interests, and appropriate its property, or intentionally waste its assets, or take money for official action, or 'sell out' by resigning, and thus giving control to others, they are liable to account in equity to the corporation or its representatives, not only for the money or property in their hands, but also for such as they fraudulently disposed of or wasted, as well as for the damages naturally resulting from their official misconduct; and even, as we have recently held, for money received by virtue of their office. *McClure v. Law*, 161 N. Y. 78, 55 N. E. 388. A court of equity has power, at the instance of the proper party, through its flexible and comprehensive action for an accounting, to inquire into every official act of the officers and directors, and, testing them by the standard of good faith and the absence of gross negligence, to compel restitution of property withheld, with compensation for assets wasted, and to award damages for the natural consequences of official misconduct, when such damages are claimed, in connection with equitable relief, on account of a general course of injurious action or a conspiracy to despoil the corporation. Even if part of the relief could be had in actions at law, still, when it is sought in connection with strictly equitable relief, such as the discovery of trust property and the recovery thereof, and the right to all relief springs from a common cause, such as a conspiracy, all may be included in the sweeping action for an accounting.

* * * * * * * *

"* * * The value of the assets wasted and the amount of expense incurred as the direct and natural result of the conspiracy must be accounted for

by the defendants, because those assets were intrusted to their care and protection as trustees, and, having broken their trust, they are liable for all the proximate consequences. Through an action for an accounting a court of equity has power to discover and fix the value of all assets improperly withheld pursuant to the conspiracy, and of all property lost and damages caused by the wrongful acts of the defendants, and to compel them jointly and severally to pay the aggregate amount over to the plaintiff. Through the conspiracy, and the overt acts in execution thereof, the defendants violated their duty as trustees, and equity will award complete relief in a single action for all the consequences of such violation, even if a part thereof might be had in an action at law. While the *cestui que* trust may sometimes proceed at law against his trustee, he need not do so, but may always call him into a court of equity. That course was pursued in this case, and the entire complaint, although verbose and inartificial in form, is simply an action to compel trustees to account, except so far as it seeks to set aside a written contract entered into between one of the defendants and the corporation in partial execution of the conspiracy, whereby assets were to be wrongfully diverted to him. All the defendants are responsible for that contract, for it was part of the fraudulent confederation into which they all entered. It was part of the wrong intended and accomplished by them. The cause of action to set it aside was properly united with the cause of action to compel the defendants to account for the injurious results of the arrangement of which it was a part. Both causes of action were founded upon claims against trustees arising by operation of law. Code Civ. Proc. § 484, Par. 8.

The fundamental fact upon which the right to all relief rested was the conspiracy entered into by the trustees against the corporation to do or aid in doing all the acts complained of. All the injuries charged result from the overt acts of the defendants pursuant to and in execution of the conspiracy. As all stand on that common ground, all were affected by each cause of action, although not equally. All were proper parties, and the cancelation of the contract was relief appropriate and incidental to the main object of the action, which was to compel trustees to account for official misconduct, and make restitution of property withheld, with compensation for property wasted and expenses necessarily incurred to prevent further injury. In a single equitable action the court may go to the bottom of the wrong, and work out, in such form as the facts require, all the relief called for by the conspiracy of the defendants against the corporation towards which they stood as trustees."